Supreme Court, U.S.
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No. 99-154

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, and ROBERT A. JUDGE, SR., SECRETARY OF THE DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

FELICE NEWMAN and STEVE ZUPCIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

DAVID J. MILLSTEIN
MILLSTEIN & KNUPP
Attorneys for Respondents on behalf of the American Civil Liberties Union, Greater Pittsburgh Chapter
P.O. Box 467-
Youngwood, PA 15697
(724) 837-3333

154593

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

REASONS FOR DENYING THE WRIT

THE PETITION FAILS TO PRESENT ANY COMPELLING REASONS TO GRANT REVIEW

A. This Case Is Controlled By *Texas Monthly*

The Supreme Court has already decided this issue. In *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), this court faced the exact kind of taxing scheme presented by the case at bar and determined that such a scheme violated the Establishment Clause of the First Amendment. The plurality opinion in *Texas Monthly* has been cited with approval by this court as recently as 1994 in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

Texas Monthly is still good law and should control disposition of this matter.

B. There Is No Tension Between The Holdings In *Walz* And *Texas Monthly*

The thrust of Petitioner's argument is that there is conflict or tension between the Court's holding in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), and that this Court should undertake review to resolve that conflict. It is the contention of Respondent that no such conflict exists and that no review is necessary.

In *Walz*, the Court made it clear that the exemption of church held real estate from the imposition of real estate taxes was part of an overall secular scheme of tax relief granted by the taxing authority to a broad range of organizations, including museums, hospitals, zoos, school, churches and synagogues, among others, because the taxing authority had decided that organizations engaged in not for profit, charitable or educational work should receive such a break. It is critical to note that the tax scheme

had a clear, identifiable secular purpose, and the fact that religious organizations happen to fall into that broad secular category did not alter the secular purpose of the legislation.

The same cannot be said of the tax scheme currently before the Court. The legislature of the Commonwealth of Pennsylvania has essentially hand picked a number of articles it has chosen to exempt from sales tax, and the only common thread connecting those articles is simply that they have been so chosen.

Petitioner has correctly noted (Pet., page 3) that "*among* the categories exempted are a wide array of items related to expressive, charitable, educational and religious activities," (emphasis provided) and therein lies the problem.

Under the statute in question, (Section 7204 of the Pennsylvania Tax Reform Code of 1971, Title 72 Pa. Stat. Ann. § 7204) such diverse items as water, toothpaste, toilet paper, feminine hygiene products, steam, gas and fuel oil, electricity, false teeth, caskets, mail order materials, tourism materials, coal, crutches and magazine subscriptions, among others, are specifically named and exempted from the imposition of sales tax. Included in this hodge podge are the items challenged in this cause of action, . . . [t]he sale . . . or use of religious publications sold by religious groups and Bibles and religious articles (§ 7204, Subsection 28). Unlike the situation presented in *Walz*, there is no overarching secular scheme that rationally and reasonably connects the products chosen by the Pennsylvania legislature for exemption.

While there will always be inherent tension between the Free Exercise Clause and the Establishment Clause, the facts of this case distinguish it from such cases as *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). In *Amos*, the Court drew a clear distinction between exempting religious organizations under the Free Exercise clause from laws that may interfere

with their internal operations and those laws which, forbidden under *Lemon*,[1] have the government advancing religion through its own activities and influence.

Surely the Commonwealth's decision to identify religious articles and include them in a group of otherwise unrelated items as entitled to exemption from Pennsylvania sales tax is the very kind of direct advancement of religion prohibited by *Lemon*. As Justice Brennan wrote in *Texas Monthly*,

> (T)he core notion animating the requirement that a statute possess "a secular legislative purpose" and that "its principal or primary effect . . . be one that neither advances nor inhibits religion," *Lemon v. Kurtzman*, is not only that government may not be overly hostile to religion but also that it may not place its prestige, coercive authority or resources behind a single religious faith *or behind religious beliefs in general*, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

489 U.S. at 9. (Emphasis provided).

The action of the Commonwealth in hand-picking religious articles for favored treatment under the sales tax code clearly places the prestige and coercive authority of the state behind religious beliefs in general and must therefore fail under traditional *Lemon* analysis.

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1. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

C. The Precedential Value Of *Texas Monthly*

Lastly, Petitioner argues that *Texas Monthly*, as a plurality opinion, lacks sufficient precedential value to be binding on this matter. It is a specious argument.

As the Pennsylvania Supreme Court correctly noted, Justice Brennan's plurality opinion, supported by only two other justices, was essentially based on the "breadth of coverage" standard enunciated in *Walz*. Justice Blackmun, joined by Justice O'Connor, in a concurring opinion, essentially agreed with the plurality opinion with respect to "breadth of coverage" standard of review when he wrote

> . . . by confining the tax exemption exclusively to the sale of *religious* publications, Texas engaged in preferential support for the communication of religious messages.

489 U.S. at 29. (Emphasis provided).

While holding to a narrower scope of analysis than Justice Brennan's plurality opinion, Justice Blackmun nonetheless wrote

> (w)e need to decide here only whether a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause. I conclude that it does.

Id.

Thus five justices in *Texas Monthly* concluded that a sales tax exemption of the type under present review violates the Establishment Clause, and that constitutes a majority of the court.[2]

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2. Justice White, in a separate concurrence, concluded that the tax scheme constitutes content based discrimination and therefore violates the Free Press Clause. Thus six justices found that the tax scheme in question violates various sections of the First Amendment.

CONCLUSION

Based upon the clear precedent established by *Walz* and *Texas Monthly*, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID J. MILLSTEIN
MILLSTEIN & KNUPP
Attorneys for Respondents on behalf of the American Civil Liberties Union, Greater Pittsburgh Chapter
P.O. Box 467
Youngwood, PA 15697
(724) 837-3333